

IN THE MATTER OF THE ONTARIO HUMAN RIGHTS  
CODE R.S.O. 1970, CHAPTER 318, AS AMENDED

AND IN THE MATTER OF the complaint made by  
Ms. Hetty J. Hendry of Brockville, Ontario,  
alleging discrimination in employment by  
the Liquor Control Board of Ontario,  
Brockville Shopping Centre, Brockville,  
Ontario.

BOARD OF INQUIRY

D.A. Soberman

Appearances :

Mr. A.C. Millward	-	Counsel for the Ontario Human
- and -		Rights Commission and the Com-
Mr. D.A.J. D'Oliveira		plainant, Ms. Betty J. Hendry
Mr. J.A. Sproule, Q.C.	-	Counsel for the Respondent,
		the Liquor Control Board of
		Ontario.



This inquiry is concerned with the complaint of Ms. Betty J. Hendry against the Liquor Control Board of Ontario, alleging that it discriminated against her in violation of section 4, subsection 1(b) and (g) of the Ontario Human Rights Code, R.S.O. 1970, c. 318 as amended, by refusing to employ or to continue to employ Ms. Hendry because of her sex. .

#### THE FACTS WITH RESPECT TO PART-TIME EMPLOYMENT

Ms. Hendry is 42 years old and a long time resident of the Brockville area. Since 1973 she has lived in the city of Brockville itself. In August 1975 she was looking for work and decided to make inquiries in the local LCBO store in the Brockville Shopping Centre, a store known as No. 351. She obtained an application form there for part-time employment and had an interview with the store manager, Mr. Jim Jones. Mr. Jones said that if she was interested in work she should see Mrs. Gwen Rosenberg who was a member of the executive of the Progressive Conservative Party in the riding of Leeds. Ms. Hendry said she was rather irritated by this suggestion but acted on the advice because she wanted work. Apparently the discussion with Mrs. Rosenberg was short and it was not clear from the evidence of Ms. Hendry exactly what was discussed other than that Ms. Hendry wondered what it was all about. For three months nothing happened. In early December Mrs. Rosenberg informed Ms. Hendry by telephone that part-time



work would be available immediately at store No. 351. Ms. Hendry commenced work as a part-time employee on December 11, 1975.

We may note that in a typical LCBO store, the size of the Brockville store, there are about a half dozen full-time employees. Apart from the manager and possibly the assistant manager all employees share in the general duties in the store, including unloading transports, stocking shelves, taking inventory, working as cashier, cleaning the premises and sometimes doing work on the store's ledger entries. The regular staff is augmented from time to time by part-time, temporary help as required, especially during the busy seasons of December and summertime. At store No. 351, the roster of part-time help varied from a high of a dozen or so during the peak seasons to a low of two to four who remained available more or less regularly at other times of the year to fill in as needed. Part-time staff share the same tasks as the regular staff, although initially they may spend more of their time at more physical labour duties. During peak periods they may work almost full time. Part-time workers would learn when they were needed either by asking the manager or assistant manager or checking a roster that was posted at the rear of the store in an area not accessible to the general public.

It was under these conditions that Ms. Hendry began working in store No. 351. Apparently her work was sufficiently satisfactory that she was one of the part-time help kept on in the new year after the busy holiday season ended. She





continued sharing the part-time work with two or three other employees through late August of 1976. Mr. Jones was pleased with her work and the work of another part-time employee, Mr. Bill Warner. According to Ms. Hendry, Mr. Jones said he would try to give each of them as much work as possible. In fact, the two were given most of the part-time work, shared more or less equally between them. In each successive four-week period Ms. Hendry worked between 40 and 112 hours, averaging about 74 hours or 18 to 19 hours per week, just slightly less than Mr. Warner.

In the last few days of August, Ms. Hendry was told that there was no work for her. For a few weeks she continued to come back to the store to inquire about work but each time was told that there was none. In fact, a new part-time worker had been hired in July and was given work in September when none was given to Ms. Hendry. Sometime later, in October or early November, she complained to Mr. E. W. McLelland, District Supervisor for the region including Brockville. She went to Kingston to see Mr. McLelland, who said he would look into the matter. When nothing happened in the following few days, Ms. Hendry decided to telephone Mr. F. M. Burt in Ottawa. Mr. Burt was Manager of Store Operations Area No. 2, Mr. McLelland's superior in the LCBO hierarchy. Mr. Burt agreed to look into the matter and telephoned Mr. McLelland in Kingston the following day. As a result of discussions among the officers of the LCBO Mr. Jones received a recommendation from Mr. McLelland to provide part-time work for





Ms. Hendry and she was in fact given work commencing December 1, 1976. In the following four weeks she received 112 hours of work during the Christmas rush period. However, in the succeeding four-week periods from January through mid-May 1977, unlike the same period in 1976, Ms. Hendry received very little work; she averaged only 5 hours per week, while Mr. Warner (who had worked regularly from August 1976 until Ms. Hendry was taken on again in December) averaged over 28 hours per week. On May 14, 1977 Ms. Hendry was finally told by Mr. Jones that there was no more work for her and she was effectively terminated. She has not worked for the LCBO since that time.

The facts outlined above are not in dispute. However, Ms. Hendry claims that she was discriminated against as a woman by the management and staff of the LCBO and that sexual discrimination was a significant factor in the termination of employment at the end of August 1976. She further claims that the conditions which led to the termination in August 1976 persisted when, through her appeals to higher levels of LCBO management, she was taken on again December 1, 1976 and these conditions led to her second termination in May 1977.

In response, the LCBO asserts that Ms. Hendry, although an energetic and diligent worker, was bossy and aggressive, questioned authority and upset fellow employees. As a result, according to the LCBO, she was a disruptive influence in store No. 351 making it difficult for the manager, Mr. Jones to maintain staff morale and a productive operation.



After consulting with senior officers of the LCBO, Mr. Jones exercised his discretion as store manager to cease giving Ms. Hendry further work as a part-time employee. Second, the LCBO claims that because of the disturbances caused by Ms. Hendry and by her own appeals to higher authority the Personnel Department became aware of the unsatisfactory nature of her services and therefore reasonably and properly refused to consider her seriously for permanent employment. The LCBO claims that the fact of Ms. Hendry being a woman played no role whatsoever in their treatment of her or in their decision not to hire her in any capacity either full-time or part-time.

Having heard the testimony of Ms. Hendry, of two fellow employees at store No. 351 and of Mr. Jones, the manager of that store, I would think that Ms. Hendry is very likely not an easy person to work with. Although she has limited formal education and a not very impressive work record before joining the LCBO in a part-time capacity, she nevertheless had aspirations to become a store manager. Such aspirations may well be a delusion, and probably seemed unrealistic to fellow employees to whom she may have communicated them. Mr. Greenham who was a member of the permanent staff at store No. 351 and who has known Ms. Hendry for over twenty years, seemed generally sympathetic toward her, but did admit that she was "bossy".

Nevertheless, she was a sufficiently diligent and competent worker that after the busy season of December 1975, Mr. Jones selected her as a person to share the major load of



part-time work with Mr. Warner through the first six or seven months of 1976. If Ms. Hendry's difficult personality traits were as severe as claimed by the LCBO, it seems unlikely that Mr. Jones would have chosen to keep her on staff for such a lengthy period in 1976, at 18 to 19 hours per week. Her relations with others in the store may have worsened through this period, but if so we must examine the reasons for any deterioration. If it was due simply to growing conflict with some members of staff, we might conclude that the problem arose from causes unrelated to sexual discrimination. In that case I might agree that Mr. Jones exercised his normal managerial discretion in ceasing to assign work to Mrs. Hendry.

Counsel for Ms. Hendry pointed out that those qualities attributed to Ms. Hendry by the respondent may be viewed in a rather different light: what may be seen as aggressiveness in a woman might be seen as energy and ambition in a man. In other words, attributes considered in a perjorative light in a woman may be thought of as desirable in a man, according to traditional male-female stereotypes. In this view, had Ms. Hendry been a man these attributes would have been looked upon with less criticism and hostility.

There is one substantial piece of evidence to support this submission. Two members of the permanent staff in store No. 351, a Mr. Aikens and a Mr. Carr, had health problems which legitimately entitled them to be placed on "light duty", that is, they were excused from lifting and moving heavy cases, a rather important part of the work of a typical LCBO







clerk. Apparently on more than one occasion, when these two men were visible to the public and seen not to be doing any work in particular, Ms. Hendry was seen to be lifting and moving a heavy case of liquor. Now, we are aware that the traditional view in our society is for men, not women, to be seen doing the heavy work. Accordingly, a customer or customers commented on Ms. Hendry doing heavy work with the men standing around. Implicit in a comment of this type is more criticism of the men than praise of the woman. And the men did not like it. Their reaction was natural enough in our society: they were not well but did not go about announcing their poor health; yet they were being criticized by the public for apparent laziness. Of course, if it had merely been another man moving the cases, no comment would likely have been made. But here it was a woman, who was the cause of the comments, a part-time woman and one who was rather aggressive and bossy at that. Some hostility was understandable in these circumstances, though of course, it was not caused by Ms. Hendry. The LCBO can hardly be responsible for the comments of customers or for the upset caused to employees on light duty. Should the burden then fall on Ms. Hendry who was simply doing her job?

In my opinion that cannot be so, for we would then reinforce the status quo and remove responsibility from an employer, in this case a public employer, for acting to avoid the ill effects of discrimination. In helping to change traditional views of roles for men and women, employers -- especially large institutional employers -- must bear the



main burden of change: the burden should not be allowed to fall on those who would otherwise suffer the harms of discrimination. Therefore, the burden of resolving the conflict between those workers on light duty and Ms. Hendry was that of the LCBO. It could not get rid of its problem simply by dismissing Ms. Hendry and returning to the peace and comfort of an all-male "happy family" that Mr. Jones wished for. As difficult as it may be for management, in my opinion it was the task of the LCBO, through Mr. Jones, to explain to the unhappy male workers that they might have to put up with occasional remarks by uninformed members of the public; perhaps they could remove themselves from public view at such times when Ms. Hendry happened to be engaged in heavy work, but in any event it was not Ms. Hendry's problem. Unfortunately we have no evidence from Mr. Jones of what he did to explain this problem to the offended workers on light duty if indeed he recognized it as a problem to be resolved. And neither of the unhappy men was available to give evidence before the Board.

Ms. Hendry's own personality may well have contributed substantially to any growing friction and a drop in morale among the staff. But if the fact that she was a woman affected the perception of the staff and materially contributed to the conflict and eventually to Mr. Jone's decision not to offer her any more work, then Ms. Hendry's sex did affect her treatment by the LCBO. Although the time when the customers made remarks about Ms. Hendry doing heavy work was not firmly



established it seems to have occurred some time in the first few months of 1976. By late spring or early summer, it was generally agreed by witnesses who worked in store No. 351, that there was some friction and drop in morale. Three and one half years had passed between the occurrence of these events and the hearing, and it is understandable that accurate dating of the events is rather vague. Nevertheless, it is my view that the deterioration did begin to take place by May or June 1976, from a combination of factors: resentment by Mr. Aikens and Mr. Carr, Ms. Hendry's diligence and bossiness and her communication to other employees that she had ambitions to become a store manager. She must have been viewed as something of an upstart, a female upstart at that.

We have no evidence of Mr. Jones trying to make peace among his staff. Rather we have one piece of evidence from July and August 1976 suggesting that he was anxious to end the problem by some other means. According to Ms. Hendry, she was helping unload a truck at the time, one of the hardest tasks physically since it may take several hours to transfer all the cases from the truck to the store warehouse. Mr. Jones expressed concern about Ms. Hendry appearing flushed and perspiring. He thought she should see a doctor about her blood pressure. Ms. Hendry replied that she had had a medical examination recently and there was nothing wrong with her. He felt she ought to have another examination to see whether something was wrong. Ms. Hendry did visit her doctor and he





provided a letter to the LCBO dated August 17, 1976, stating that she was "physically and mentally capable of employment on a regular basis with LCBO". Mr. Jones had no recollection of this incident and did not think it had occurred. However, I believe that is simply a failure of his memory. There would be no reason for a physician to provide Ms. Hendry with such a letter except at the request of her employer. I find that the incident did take place as described by Ms. Hendry. The reasonable inference from these facts is that Mr. Jones hoped medical evidence might prove Ms. Hendry incapable of continuing to work for him. His motives may well have been humane, but he nevertheless did not appear to face squarely the causes of his problems, or at least he appeared not to distinguish among the causes. When the medical basis failed, within a few days he made up his mind to terminate Ms. Hendry's employment. In my view, one of the material causes was that the complainant was a woman in a long-time male preserve, the retail LCBO retail store.

#### CONCLUSION WITH RESPECT TO PART-TIME EMPLOYMENT

The leading case on the importance of one material cause among others in dismissal from employment is Regina v. Bushnell Communications Ltd., et al. (1974) 4 O.R. (2d) 288, where the accused was charged under the Canada Labour Code with dismissing an employee, "because the person is a member of a trade union" (R.S.C. 1970, c. L-1). In that case there was evidence of great acrimony among a number of employees



and especially with the subsequently dismissed employee, whose dismissal led to the charge. In fact, at one point in a meeting there was near physical violence involving the employee. There seemed ample cause, apart from any membership in a trade union, for dismissal. However, the dismissal came a day after the employer received advice that the employee had joined a union. It was not suggested that union membership was the sole or even dominant cause in dismissal and it was admitted by the court that had he been dismissed earlier, the dismissal would likely not have been wrongful. Yet the court found that union membership was "a proximate cause for dismissal...present with other causes", and convicted the accused corporation.

As I have already found, Ms. Hendry being a woman was a material cause, that is, a proximate cause, one that played a part even if subconsciously and even if "present with other causes" in the decision to terminate her employment. On this basis I find that Ms. Hendry was dismissed contrary to section 4, subsection 1(b) of the Human Rights Code /and that the LCBO refused to continue to employ her because of her sex. I shall deal with the appropriate remedy after I consider the complaint with respect to Ms. Hendry's application for permanent employment.

THE FACTS WITH RESPECT TO THE APPLICATION FOR PERMANENT  
FULL-TIME EMPLOYMENT

Ms. Hendry was also interested in obtaining full-time permanent employment with the LCBO. In April of 1976, four months



after she began part-time work and again in April of 1977, just a few weeks before her termination, she filled out and sent to the Toronto head office applications for permanent employment. In each case she received acknowledgements of her application by form letter, but was never contacted again although at least two other persons were hired as regular staff in 1976 and 1977 in the two Brockville area stores. Ms. Hendry made further applications in 1978 and 1979, but these were after she commenced her complaint against the LCBO, first through the Ombudsman and subsequently through the Ontario Human Rights Commission. Ms. Hendry asserts that the bias in her treatment as a part-time employee was a significant factor in the decision of the LCBO not to consider seriously her application for permanent employment. We should note that counsel for the LCBO agreed that Mr. Jones's judgment about the suitability of Ms. Hendry for part-time employment was communicated to senior personnel officers of the LCBO and affected the way in which they handled her application. The application appears never to have been seriously considered. References were never checked and no systematic written assessment of the applicant was ever made.

In my view it is important to examine hiring practices of the LCBO generally in order to come to a conclusion about the treatment of Ms. Hendry's application for permanent employment. There is ample historical evidence for the fact that at one time both provincial and federal governments considered all positions of employment to be within the





discretion of the current government. Employees held office at the pleasure of the government in power, and many if not most could be expected to be dismissed and replaced by those favoured by another party when the government changed hands. This system of patronage was generally considered to be both unwise and unfair for the vast majority of positions controlled by government, certainly for those at lower levels where employees played no role in development or implementation of government policy. As a result, over the years we have developed a system of independent bodies and commissions to create hiring practices free from political interference. The process has been slow and some areas still seem subject to patronage, at least to some degree and in some regions of the province.

During the hearing we received uncontradicted testimony from two witnesses who said they were steered toward, and in some sense approved by a member of the local Progressive Conservative Party for part-time jobs at store No. 351 and the downtown store in Brockville. Ms. Hendry had applied for work directly to store No. 351 and was sent from there to Mrs. Rosenberg, who had no position within the LCBO hierarchy apart from her connection with the governing Progressive Conservative Party. Mr. Weidenaar was informed by Mrs. Rosenberg that the downtown Brockville store could use part-time help. Since the hiring, assignment of work and termination of part-time employees is within the discretion of local store managers it could be argued that the system of patronage was restricted to



the two Brockville stores and in any event seemed relatively benevolent. There is no evidence that either Ms. Hendry or Mr. Weidenaar supported the party in power. Indeed, Ms. Hendry disclosed some irritation over the process and was still hired. However, there was no discussion of these events by other witnesses or by counsel and no suggestion by the respondent that the conduct in Brockville was exceptional. In my opinion we could not conclude that the practice is merely an isolated one in Brockville.

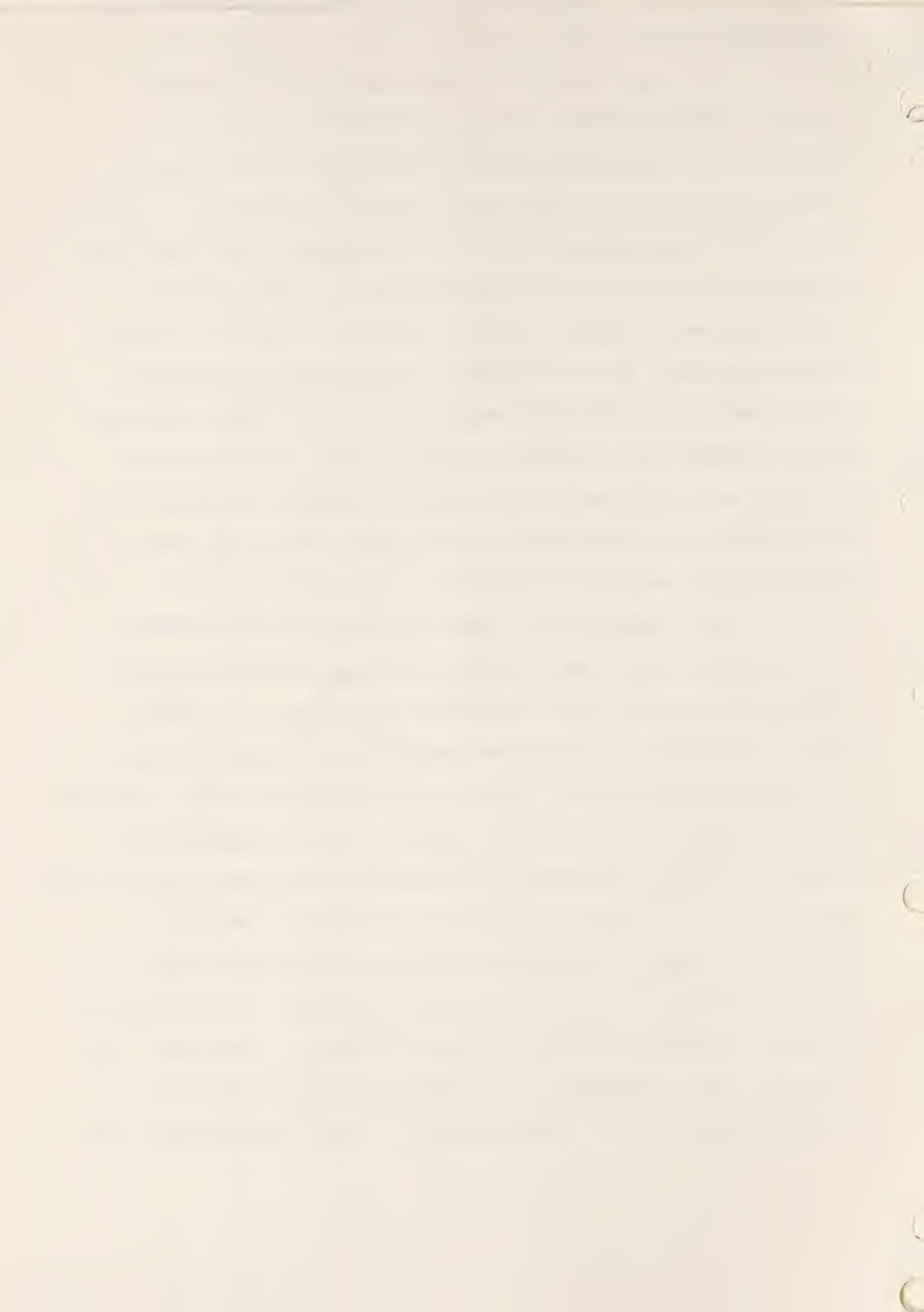
It may be further argued that in any event this type of patronage exists only with respect to part-time hiring by local store managers, and that applications for permanent positions are processed centrally at the LCBO head offices in Toronto through a personnel department. We have been told that the LCBO is a vast organization with several thousand permanent employees, and that it receives about 3600 applications for permanent employment each year. It must process between 70 and 90 applications each work week. Accordingly there is a standard, three page application form for all applicants.

Mr. E. P. Willcock, the Recruitment Supervisor for the LCBO for the last five years, was questioned in detail about processing applications. Unfortunately, his testimony has left us with a very unclear picture of what happens. I do not believe this picture is a result of any unwillingness on Mr. Willcock's part to be explicit. Rather it seems to be the result of a remarkably loose and unregularized system of



recruitment and hiring. The witness could not give the hearing a clear picture of how applications are routinely handled. There seemed to be no system for a more junior member of the recruitment staff to write to the referees listed by the applicant nor any system of assessing educational qualifications or work experience. Nor could we discover what proportion of applicants received personal interviews nor by whom. Despite the senior office and great responsibilities of Mr. Willcock, he apparently conducted interviews with prospective employees at the lowest permanent level of Clerk II, a matter to which I will return shortly. In fact, he interviewed a Mr. Charles Thompson, an applicant for a position at approximately the same time as Ms. Hendry submitted her second application in the spring of 1977.

Mr. Thompson, had been an employee of the Ontario Civil Service acting as chauffeur to various members of the Legislative Assembly and Ministers of the Crown for three years. He wished to leave that position and return to his home town of Brockville. Accordingly he applied for a position with the LCBO which is a Crown Agency. Civil servants and employees of Crown Agencies are members of separate organizations and there is no right of transfer or priority given to a person who wishes to leave one service and join the other. As a practical matter, it may be that an employee in one group is looked at favourably by recruiting officers in the other. In any event, Mr. Thompson's application had been received. No check was made of his references but he was interviewed by Mr.





Willcock, who also spoke by telephone to the District Supervisor, Mr. McLelland. They agreed to hire Mr. Thompson to fill a vacancy available in store No. 351. In order to understand the uncertainty of the whole process, I shall quote excerpts from the transcript of Mr. Willcock's testimony:

Q. Now, at the time that you were considering Mr. Thompson's application, do you know at the moment how many, if any other applications for permanent positions were on file in your office from people in Brockville seeking employment with the LCBO?

A. No, I do not.

Q. Do you recall if you made a check at the time?

A. I recall that I looked at some. How many there were, I don't know.

Q. Do you think there was more than one?

A. I would say so.

Later in the testimony the following questions were asked:

Q. Now do you recall, in respect of Mr. Thompson, ...whether you specifically checked his references?

A. No, I did not.

Q. You did not check them?

A. Not at that time.

Q. I see. At which time?

A. Later a credit check was done...

Q. But did you, for example, 'phone the Honourable Mr. Irvine for a reference?

A. No, I did not....



Q. Did you have any outside knowledge as to whether he, for example could get along with people other than your own observations?

A. I would say he had been doing so for three years. That's all I could base my knowledge on, and what I felt about the man when I interviewed him.

Thus, Mr. Thompson was hired on the basis of his application form, an interview with Mr. Willcock and a telephone conversation between Mr. Willcock and Mr. McLelland. There was no evidence of a comparison of the merits of other candidates, and Mr. Willcock agreed that Ms. Hendry was eliminated because of unfavourable reports about her.

With respect to Mr. Willcock's role in interviewing, he was asked whether he interviewed every applicant. He replied that he did not and could not say what proportion he did interview. He could not recall specifically what women applicants he had interviewed. Again, it is useful to examine the transcript:

Q. ...[Do] you interview everybody who is hired as a store clerk at the LCBO?

A. No.

Q. How many of the people who are hired as store clerks would you interview?

A. Hmm, it's hard to say.

Q. ...looking at the statistics where there were eighteen women employed in the stores in 1975 and the next year, that number appeared to have risen by about thirty-two... Would you have any idea or estimate of how many of those women you personally would have interviewed?

A. No.



Q. Well, do you recall if you interviewed any of them?

A. What was the year?

Q. It was '75-76.

A. No, not that year. I don't remember.

There followed some discussion about interviewing women applicants from time to time. Mr. Willcock stated that there are other people in the office who interview applicants, but he could provide no specific information about the allocation of duties and responsibilities for interviewing. Interviews for applicants distant from Toronto seem to be carried out by District Supervisors. In response to a series of questions from the chairman about the division of duties in Mr. Willcock's office, he stated that interviewing depended "a lot on the workload at any specific time...you play it by ear...who's going to do the interview..."

Based on the evidence of Mr. Willcock and other senior officers of the LCBO who gave evidence, I believe that the recruiting practices, although nominally centralized, are largely passive. That is, the recruitment system responds to local needs; when a store is shorthanded either because of loss of staff or increase in business, the manager requests one or more additional permanent staff. It would be a fairly simple calculation, based on the size of a store and its volume of business; to decide on the number of permanent staff according to established norms. At that point, the recruitment office in Toronto rather cursorily examines applications on hand and





then seems to rely largely on recommendations from District Supervisors who in turn are in touch with local store managers. In the Brockville area at least, several recent full-time employees started out as part-time help. The views of store managers on such applicants are sought by senior officers. Hence, whether intentionally or not, at least in the Brockville area, patronage plays a role in who becomes part-time help and consequently in who eventually becomes a permanent employee.

In summary, so far as can be discerned from the evidence before the hearing, the procedures for recruitment and hiring of permanent employees lacks systematic and careful examination of applicants on a comparative basis. For this reason I do not believe that the handling of the application of Mr. Charles Thompson was unusual in its laxness, nor did it demonstrate any political interference. There is no practical way of deciding, if Mr. Thompson's application had been carefully considered along with that of Ms. Hendry and any others on file, whether he or some one else would or should have been selected. In my opinion, however, Ms. Hendry would not have been selected because of the adverse reports already received by Mr. Willcock.

An important question argued by counsel for the Human Rights Commission concerned the LCBO's overall record as an employer. Counsel contended that the LCBO has a very poor record in hiring women who form a minute part of the LCBO store work force when compared with the ratio of women employed generally in our society. The figures placed in evidence before the hearing, as provided by the LCBO, were as follows:



YEARS	TOTAL PERMANENT EMPLOYEES			PERMANENT STORE EMPLOYEES		
	Men	Women	(% Women)	Men	Women	(% Women)
1974-75	—3344— (total)			2748	18	0.65%
1975-76	3203	230	6.7%	2791	50	1.76%
1976-77	3311	196	5.6%	2737	60	2.14%
1977-78	3355	214	6.05	2830	75	2.58%
1978-79	3388	205	5.7%	2837	84	2.87%

Mr. d'Oliveira, on behalf of the Commission argued very ably that these figures, while disclosing some minimal change and improvement in the performance of the LCBO established a prima facie case of systematic discrimination against women by that Crown Agency. He relied on recent developments in United States jurisprudence which has been the main source for our legislation in this area. A number of U.S. cases from the mid 1970's were cited, discussing the recognition by American courts of the weight to be given to statistical evidence of discrimination in employment. The courts there seem ultimately to have concluded that statistics are often better evidence of discrimination than single instances of alleged discrimination and its denial.

In my view, there are major differences in the evolution of the law in the United States and Canada on this subject. First, the right to equal treatment in the United States is derived from basic protections found in the American Constitution. The acts of various legislatures and of the courts themselves are seen as a furtherance, a more efficient



mode, of implementing those rights guaranteed by the Constitution at least since the post-Civil-War period in the last century. In Canada, human rights legislation is seen as creating new legal rights for individuals as a result of recent enlightenment and new sensitivity in our society. It is not that these protections should not have been legally recognized earlier, but simply the fact that they were not until our legislatures and courts acted. In this environment the history of our institutions and their practices before current legislation came into effect must not be held against them. An employer cannot be found a wrong-doer retrospectively, even if he may be under a present duty to remedy an existing situation.

Traditionally in our society, especially since the days of temperance and prohibition, the production, sale and consumption of alcoholic beverages was looked upon as an evil, a special range of activities from which women were expected to absent themselves. "Respectable" women would not be seen in a liquor store at all. Whether before the present Code came into force the LCBO would have hired women store clerks is not relevant. So far as we know it did not do so. Other aspects of the liquor business, such as exclusive men's areas in licensed premises, were legislated out of existence only in the mid 1970's. Accordingly, it is easy to understand that at the beginning of the 1970's there would have been a very small proportion of women working for the LCBO. And no doubt it has taken time for women themselves to think of work with the LCBO





as appropriate for them, much as it has taken time in such other occupations as police work and engineering.

The question is whether the LCBO has moved reasonably with the times in comparison with other sectors of the employment market, not for the purpose of condemning the LCBO for past practices but of encouraging it to comply with currently acceptable standards. The LCBO statistical data is incomplete: it does not disclose the proportion of male applicants to female applicants nor their respective success rates in obtaining employment; it does not disclose the annual rate of staff turnover and therefore the opportunities to correct historical imbalances (if the turnover rate is very low, it will take a much longer time to make corrections). Nor did we receive any information on LCBO practices in advertising and recruiting, if any. The minimal statistical information we do have suggests a very large imbalance as between men and women and very little progress in changing that balance. In the absence of any other evidence on the subject, I have concluded that the recruiting practices of the LCBO are largely passive. With little if any active recruitment, it has had little opportunity to affect existing discriminatory patterns. The system of patronage at the local level would also seem to reinforce existing stereotypes of the typical LCBO male clerk. Thus the status quo remains, not through any institutional opposition by the LCBO nor by any conscious desire to discriminate, but merely by perpetuating the existing system. I believe the Ontario Human Rights Code expresses in its preamble a will and a duty to change existing practices. -It



is the responsibility of the LCBO to make such changes as are necessary to ensure compliance with the spirit and the letter of the Code. I find that it has not done so, either in the particular treatment of Ms. Hendry's application for permanent employment or in its handling of recruitment generally.

#### REMEDY WITH RESPECT TO PART-TIME EMPLOYMENT

Ms. Hendry was hired as a temporary, part-time employee. As such she had no right to expect continued employment indefinitely into the future. She did have a right not to be terminated through a breach of the Human Rights Code. Accordingly, she is entitled to compensation for the loss caused by that breach. Since the employment was temporary but indeterminate, it ought not to be considered open-ended, continuing indefinitely, or even for the lengthy time that elapsed between termination in May 1977 and the hearing in December 1979. No evidence was adduced by either party of the average length of service of temporary employees. Indeed, it may be very difficult to arrive at such an average. First, some part-time employees are clearly short term: students during holiday periods; temporarily unemployed persons between full-time jobs; retired persons who wish to work for a short time. Second, there may be regional differences: there may be much higher turnover in some areas such as larger cities than in small communities. As a result, my estimate of the loss suffered is a sum less than an amount that could



but it is not an insubstantial sum.

First, I believe Ms. Hendry is entitled to a sum equal to half the total earned by Mr. Warner and the person who worked the next largest number of hours between September 7, 1976 and November 27, 1976, the period before she was rehired. In that period Mr. Warner and Mr. Robertson together worked a total of 513 hours. Half would be 256.5 hours at \$4.08 per hour, or \$1,046.52.

Second, Ms. Hendry is entitled to a sum, on the same basis, between December 28, 1976 and her final termination May 14, 1977, less any sum actually earned by her. During that period Mr. Warner and Mr. Went (who replaced Mr. Robertson as the part-time employee working the next largest number of hours) worked a total of 798 hours. Half would be 399 hours, less 100 hours worked by Ms. Hendry leaving a net difference of 299 hours at \$4.08 per hour, or \$1,219.92.

Finally, we may note that during the 32 week period covered by the above calculations, the average number of hours worked per week by Mr. Warner and the employees working the next largest number of hours is 20.5 [ $256.5 + 399 = 655.5$ ;  $655.5 \div 32 = 20.5$ ]. I believe Ms. Hendry should be entitled to receive compensation for that number of hours per week at the increased LCBO rate of \$4.49 per hour for a period of a further six months, less any earnings actually received from other sources during the same period. For that 26 week period the sum would be \$2,393.17. However, during that same period Ms. Hendry earned \$3,453.46 while employed at St. Lawrence Lodge,





so that she suffered no net loss in earnings and no award need be made for that period. (The same result would have followed even if the period had been extended to a year; Ms. Hendry earned more elsewhere).

In sum then, the compensation awarded to Ms. Hendry against the LCBO with respect to her dismissal as a part-time employee is \$2,266.44. The LCBO is responsible for deducting from this sum and returning to the Unemployment Insurance Commission any sums received by Ms. Hendry that are liable by statute to be returned to the Commission for the periods, September 7, 1976 to November 27, 1976, and December 28, 1976 to May 14, 1977.

#### REMEDY WITH RESPECT TO APPLICATION FOR FULL-TIME EMPLOYMENT

The matter of an appropriate remedy for the failure to consider seriously Ms. Hendry's application for permanent employment raises several questions. First, we have the uncertainty whether Ms. Hendry would have been offered a position had her application been seriously considered. I have examined her application and two other applications put in evidence, that of Mr. Warner and of Mr. Thompson. No assessment of these applications accompanies them, nor are letters of reference attached. Despite the slim nature of the evidence, I do not find Ms. Hendry's application a strong one. However, I could not rule it out, especially considering the lack of articulated LCBO criteria for hiring. Thus, while Ms. Hendry was denied the chance for serious consideration, it is by no



means clear that she was likely to be offered a position had she received such consideration. Even so, it could be argued that an aggrieved party should receive a meaningful remedy. To require simply that the LCBO reconsider her application in the light of this decision might well lead to no useful remedy to Ms. Hendry: the LCBO might find that no position is now available, or that on careful consideration there are one or more better applicants available for any vacancies - or it might simply decide after checking references that Ms. Hendry is unsuitable.

A stricter remedy against the LCBO would be to require it to offer Ms. Hendry a position as a permanent employee in Store No. 351, or perhaps in the downtown store in Brockville. Such a remedy would appear to satisfy the complainant's wishes. However, an order to offer a position would be analogous to an order for reinstatement to a position from which a person has been wrongfully removed, since Ms. Hendry has worked as a part-time employee in the same environment. Courts, as should tribunals such as this Board, exercise great care in ordering reinstatement, that is, forcing a person into a workplace against the wishes of the employer and possibly fellow employees. There are several reasons for this care, even reluctance, to make such an order. First, it may be economically unsound -- there may be no vacancy, the complainant being inserted as a supernumery, thus aggravating existing conflict. Second, in this case there is no certainty, or necessarily even any likelihood, that the complainant would on her merits have obtained the position had she been properly evaluated at the time of her application.



For example, there is no evidence that in 1977 Mr. Thompson was not a more meritorious applicant. Therefore, it is difficult to assert that Ms. Hendry has been wrongfully denied an offer of a job rather than to assert the lesser right that she was denied serious consideration for it. Third, and very important, the workplace is small: one manager, an assistant and a half dozen or so other full-time employees, who must work closely together in freely interchangeable tasks. Personal relations are an especially important aspect of this type of workplace. In these circumstances, to order the LCBO to provide a store position for Ms. Hendry in Brockville is very likely to create more friction and bitterness. In my opinion, it would not further the goals of the Human Rights Code. Accordingly, I decline to make such an order.

The result is that Ms. Hendry cannot expect to work for the LCBO. Her career expectations, perhaps unrealistic, have nevertheless been thwarted without having the chance that would have been provided by proper consideration of her application. She has suffered emotionally as a result of the failure of LCBO to abide by the Code, and has been insulted as a woman. As the solace available in these circumstances, both to make it clear to Ms. Hendry that her unfair treatment is recognized by this Board and to the LCBO that it must take very seriously the harm done by failure to abide by the Code, I would award Ms. Hendry the additional sum of \$8,000 as general compensation. Ms. Hendry should also receive a letter of apology from the LCBO.

The Human Rights Commission has requested the opportunity





to assist the LCBO in improving its employment practices so that they comply with the Code. It wishes to help develop a program to rectify the imbalance between men and women employed by the LCBO, and it wishes to monitor the LCBO employment practices for a period of twelve months from the date of this decision. It also requests that the LCBO post Ontario Human Rights Commission declarations of equal employment opportunities, brochures or code cards in prominent places on the premises of the LCBO facilities throughout the Province. These requests are reasonable in the circumstances and should be granted.



AND IN THE MATTER OF the complaint made by  
Ms. Betty J. Hendry of Brockville, Ontario,  
alleging discrimination in employment by  
the Liquor Control Board of Ontario,  
Brockville Shopping Centre, Brockville,  
Ontario.

O R D E R

This matter coming on for hearing on the 10th day  
of December, 1979, before this Board of Inquiry, pursuant to  
the Appointment of Robert Elgie, Minister of Labour, dated  
the 5th day of September, 1979, in the presence of Counsel  
for the Human Rights Commission and Ms. Betty J. Hendry, the  
Complainant, and Counsel for the Liquor Control Board of  
Ontario, the Respondent, upon hearing evidence adduced by  
the parties and what was alleged by the parties, and upon  
finding that the complaint was substantiated.


1. It is ordered that the Respondent post standard  
Human Rights cards or brochures in prominent  
places in all their business premises throughout  
the Province.
2. And it is ordered that the Respondent co-operate  
with the Human Rights Commission and the Women's  
Bureau of the Ministry of Labour in designing a  
program to take such steps as are appropriate to  
reduce the imbalance between men and women employed  
by the Respondent.
3. And it is further ordered that Respondent provide  
the Human Rights Commission with sufficient informa-  
tion on employment practices and statistics to



permit the Human Rights Commission to monitor the employment practices of the Respondent insofar as they relate to the Human Rights Code, for a period of twelve months from the date of this order.

4. And it is further ordered that the Respondent send a letter of apology to the Complainant for the failure to abide by the Human Rights Code in its treatment of the Complainant.
5. And it is further ordered that the Respondent pay the sum of \$2,266.44, as compensation with respect to part-time employment, and the further sum of \$8,000, as general compensation for the loss of opportunity to be seriously considered for permanent full-time employment and the resulting emotional suffering, making a total of \$10,266.44, by way of compensation to the Complainant.

DATED at Kingston the 5th day of August, 1980.

A handwritten signature in dark ink, appearing to read "D. A. Soberman", is written over a horizontal line.

D. A. SOBERMAN

Chairman, Board of Inquiry

